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February 7, 1997

**BY HAND DELIVERY**

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

**Re: MM Docket No. 91-221 -- Review of the Commission's Regulations Governing Television Broadcasting; and MM Docket No. 87-7 -- Television Satellite Stations Review of Policy and Rules**

Dear Mr. Caton:

Transmitted herewith for filing, on behalf of National Broadcasting Company, Inc., is an original and 11 copies of their Comments in the above-referenced dockets.

Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Review of the Commission's Regulations Governing Television Broadcasting | ) | MM Docket No. 91-221 |
| | ) | |
| Television Satellite Stations Review of Policy and Rules | ) | MM Docket No. 87-7 |

**COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.**

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February 7, 1997

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**Executive Summary of Comments filed by National Broadcasting Company, Inc. in MM Docket No. 91-221 and MM Docket No. 87-7**

The current duopoly rule is an anachronism in light of the sea change in video programming distribution. If retained in its present form, or modified only slightly, as the Commission proposes in the Second Further Notice, this rule will have the perverse effect of actually stifling competition and squelching diversity, precisely the opposite of what it is intended to do.

The Commission should develop a new paradigm for reviewing the duopoly rule which explicitly takes into account its anticompetitive effect on broadcasters. The maintenance of a robust, free over-the-air television broadcast system is indispensable to achieving increased competition and diversity, as well as preserving localism. Broadcasters cannot compete with other largely unregulated or deregulated multichannel video programming distributors if they are prevented by regulation from realizing efficiencies and economies of scale resulting from prudent mergers and acquisitions.

The new paradigm should also challenge the core assumption underlying the duopoly rule: that diversity of ownership leads ineluctably to diversity of viewpoint in a local community. In today's increasingly fragmented and niche oriented video marketplace, a broadcaster owning multiple stations in a local market has a host of economic incentives to offer diverse programming to broaden audience reach and increase combined market share. By contrast, a regulatorily limited single station owner will tend to offer less varied programming, inclining to replicate traditional program offerings exhibited by his/her competitors. In short, substantial relaxation of the duopoly rule is essential to realign regulation with economic incentives and marketplace reality.

Accordingly, the National Broadcasting Company, Inc. ("NBC") respectfully requests the Commission to revise the TV duopoly rule to allow the acquisition of up to two television stations with overlapping Grade A signal contours, where one or both of the stations is UHF, unless the Commission expressly finds that the combination would cause demonstrable harm to competition or diversity in the affected local market.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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|---|---|---|
| In the Matter of<br><br>Review of the Commission's Regulations Governing Television Broadcasting | ) | MM Docket No. 91-221 |
| Television Satellite Stations Review of Policy and Rules | ) | MM Docket No. 87-7 |

**COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.**

National Broadcasting Company, Inc. ("NBC") files these Comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("Second Further Notice")[1/] in the above-referenced Dockets.

## I. INTRODUCTION

In 1964, the Commission determined that restricting common ownership of two television stations with overlapping contours was necessary to promote competition and diversity in the local video marketplace. Since that time, there has been a tidal wave of change in technology which has created a sea change in the local video market. Television stations -- the number of which has more than doubled since 1964 -- now compete with multichannel video providers such as cable, DBS, and wireless cable for advertising dollars, programming, and viewers. In addition, the 1996 Telecommunications Act promises to usher in another wave of

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1/ Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Second Further Notice of Proposed Rulemaking, MM Docket Nos. 91-221, 87-7, FCC 96-438, (Released November 7, 1996)("Second Further Notice").

video providers. Blind adherence to a 30-year-old regulatory regime in the face of this transmogrification of the video marketplace in the hopes of "promoting diversity" will have the diametrical effect: it will not merely threaten diversity but will threaten the viability of over-the-air television.

The maintenance of a robust, free over-the-air broadcast system is indispensable to achieving increased competition and diversity, as well as preserving localism. Broadcasters cannot compete with other largely unregulated or deregulated multichannel video programming distributors if they are prevented by regulation from realizing efficiencies and economies of scale resulting from prudent mergers and acquisitions.

The Commission should develop a new paradigm for reviewing the duopoly rule which explicitly takes into account its anticompetitive effect on broadcasters in relationship to their video programming and information distribution competitors. This new paradigm also should challenge the core assumption underlying the duopoly rule: diversity of ownership leads ineluctably to diversity of viewpoint in a local community. In today's increasingly fragmented and niche oriented video programming distribution marketplace, a broadcaster owning multiple stations in a local market has a host of economic incentives to offer diverse programming to broaden audience reach and increase combined market share. A multiple station owner can target different audience segments on different stations, likely providing sharply divergent perspectives. Alternatively, multiple station ownership provides the flexibility to focus on a particular type of programming, e.g., news and public affairs, on one of the stations. By contrast, a regulatorily limited single station owner will tend to offer less varied programming, inclining to replicate traditional program offerings exhibited by his/her competitors.

The time has come for the Commission to conform its rules to the new reality of the video programming distribution market. Accordingly, NBC proposes that the Commission revise the duopoly rule to allow the acquisition of up to two television stations with overlapping Grade A signal contours, where one or both of the stations is UHF, unless the Commission expressly finds that the combination would cause demonstrable harm to competition or diversity in the affected local market.

## II. THE DUOPOLY RULE MUST BE REVIEWED IN LIGHT OF TODAY'S DRAMATICALLY MORE COMPETITIVE AND DIVERSE VIDEO MARKETPLACE

There is no question that the video programming distribution market has grown and changed dramatically since the current version of the TV duopoly rule was adopted in 1964.[2] At that time, there were 564 commercial television stations on the air and three major television networks -- ABC, CBS, and NBC -- providing universal, free over-the-air video programming.[3] In sharp contrast, as of August 31, 1996, there were 1186 commercial

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2/ Second Further Notice, ¶ 8.

3/ Id. ¶ 8, fn. 20.

television stations on the air.[4] Today there are four major television networks -- ABC, CBC, Fox and NBC -- and two emerging networks -- UPN and WB. Even these two nascent networks already have achieved a combined share of 9% in primetime viewing.[5]

In 1964, commercial broadcast TV was the only source of video programming; no other media, radio or newspaper, posed a serious competitive challenge to this medium.[6] Today, this is no longer the case. The tremendous growth in the video marketplace resulting from the emergence of multiple sources of video distribution services has not only increased competition for advertising dollars and program expenditures, but has exponentially increased the number of programming offerings available to viewers, thereby expanding diversity. In short, the emergence of alternative sources of multichannel video distribution services has gone a long way toward achieving the goals of the present duopoly rule -- promoting competition and diversity in programming and viewpoint.

These other sources of video distribution include:

- Cable Television. From its modest beginnings in the early 1970s, through its explosive growth in the 1980s, cable

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4/ Id.

5/ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, CS Docket No. 96-133, FCC 96-496, ¶ 86, (Released January 2, 1997).

6/ Amendment of §§ 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, Docket No. 14711, 2 Rad. Reg. 1588, 1596, 1599 (P&F)(Released June 9, 1964)("1964 Report and Order").

television today is the largest alternative source of video distribution and programming services. The Commission reported in its Third Annual Report, that "[d]uring 1996, the cable industry's total basic subscribership, total homes passed, basic penetration, and premium channel subscriptions have reached all-time highs. The industry is also offering more channels, a greater number of individual program services than at any time in the past, and higher audience levels."[7/]

Today, more people are watching cable programming than ever before. Cable television systems now pass more than 95% of the television households, with more than two thirds of those households subscribing to cable.[8/] Subscribership for cable services appears to be growing at an annual rate of approximately 3%.[9/] Cable television now comprises 30% of the public's full-day viewing hours.[10/] By comparison, network television's share in full-day viewing hours in 1996 fell by 5.8% to 65%.[11/]

The emergence of niche programming by the cable services has significantly expanded the range of diverse programming available to the viewing public. Today, viewers can select from an ever growing list of channels specializing in a variety of subject areas. For example, many cable service providers offer, on a

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7/ Third Annual Report, ¶ 12.

8/ Id. ¶¶ 13, 14.

9/ Id. ¶ 14.

10/ Id. ¶ 18.

11/ Id.

non-premium basis, the History Channel, The Discovery Channel (TDC), The Learning Channel (TLC), Arts and Entertainment (A&E), and Court TV.

Cable television is increasingly entering the local video marketplace. Pursuant to statutory Public, Educational and Governmental ("PEG") channel requirements, local cable providers are offering viewers a variety of diverse, community based and community focused programming as part of their basic cable service. Moreover, the last several years have witnessed the mushrooming growth of local cable news channels which provide diverse viewpoints and complement the growing number of cable national news networks such as CNN and MSNBC.

- Direct Broadcast Satellite ("DBS"). This service was not even contemplated -- let alone available -- at the time the duopoly rule was adopted. Yet today DBS provides up to 200 channels of diverse, digital video programming. Subscribership to DBS service increased from 1.7 million homes in 1995 to nearly 4 million homes by the end of October 1996.[12/] Analysts project that there will be a total of 13-15 million households equipped to receive DBS services by the year 2000.[13/] Moreover, MCI's purchase of a DBS license at auction in 1996 and AT&T's acquisition of an equity interest in DIRECTV, the nation's leading DBS provider, is an indicator of the highly competitive nature of video programming distribution.

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12/ Id. ¶ 39.

13/ Id. ¶ 38.

● Wireless Cable. As of the end of 1995, subscribership to this service increased to 847,000 viewers.[14] Analysts project that subscriptions will reach over 4 million by 2000.[15]

● Local Exchange Carriers ("LEC"). In its 1996 Third Annual Report, the Commission reported that "[t]he legal and regulatory changes that occurred in the past year as a result of passage of the 1996 Act are likely to have a significant effect on LEC entry into markets for the delivery of video programming."[16] While it is too early to predict the precise manner and timing of LEC participation in the video programming distribution marketplace,[17] it is inevitable. Already, US West has recently acquired Continental Cablevision, moving into the top echelon of the nation's MSOs, and Ameritech is operating as a cable overbuilder in its region.

● The Internet. The Internet is rapidly becoming the information super highway's equivalent of the "town square," where matters of local concern and diverse points of view are freely aired and shared. Unlike the traditional public gatherings at the local town square, this virtual one will be bounded by neither time nor space. As more of the TV-viewing population become computer literate and get "wired" into the

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14/ Id. ¶ 53.

15/ Id.

16 Id. ¶ 67.

17 Id. ¶¶ 70-78.

"net" -- Internet users increased by 50% in 1996[18] -- the Internet will become a major alternative source of diverse "programming" in the local marketplace.

Moreover, with the convergence of television and computing, specifically including the technology to deliver real-time video programming to personal computers, computer based video delivery platforms promise a quantum jump in diversity of viewpoints. The major providers of online services, America Online and Microsoft, have already established separate online sites covering matters of local interest in large and medium size cities. These sites cover local news, entertainment, politics, and business. In addition, there has been an explosion in personally-created websites covering a broad range of issues of local concern and diverse subject matter.

Thus, any evaluation of whether relaxation of the duopoly rule would diminish diversity of viewpoints must take these other sources of video distribution into account. As the Commission itself acknowledged in the Further Notice, "... the American public can receive home delivered video programming from a variety of outlets [and] ... it makes less and less sense to regulate a market on the grounds of ensuring diversity, without taking into account whether there is an available diverse array of non-broadcast media."[19]

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18/ Id. ¶ 99.

19/ Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and (continued...)

## III. MAINTENANCE OF FREE OVER-THE-AIR BROADCASTING AS A VIBRANT, ROBUST VIDEO PROGRAMMING MEDIUM IS A CRITICAL FACTOR WHICH MUST BE CONSIDERED IN THE COMMISSION'S REVIEW OF THE DUOPOLY RULE

The Commission has addressed the issue of duopolies in broadcasting since 1938, when it adopted a strong presumption against granting broadcast licenses which would result in the creation of duopolies in a particular community.[20] As indicated above, the current version of the TV duopoly rule was adopted in 1964 and provides in relevant part: "No license for a TV broadcast station shall be granted to any party (including parties under common control) if the grant of such license will result in overlap of the Grade B contours of that station ... and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party."[21]

The validity of the current duopoly rule has always been predicated implicitly on the existence of a vibrant, robust broadcast medium to provide universal, free over-the-air video programming. At the time the current rule was adopted, and for many years thereafter, the existence of an economically healthy broadcast television industry was and could be taken for granted. Accordingly, the need to preserve the economic viability of

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19(...continued)
Rules, Further Notice of Proposed Rule Making ("Further Notice"), MM Docket Nos. 91-221, 87-8, FCC 94-322, 10 FCC Rcd. 3524, 3546 (released January 17, 1995).

20 Further Notice at 3528 (citing Genessee Radio Corp., 5 FCC 183 (1938)).

21 47 C.F.R. § 3555(b).

broadcast TV was never given independent consideration in the course of the Commission's duopoly rulemaking deliberations; instead, the focus of the Commission was on achieving the twin goals of promoting competition and diversity.

As indicated above, the proliferation of alternative sources of video programming has resulted in a dramatic increase in competition for program distribution and advertising markets, as well as greater diversity in programming and viewpoint. The effect of these changes on broadcast TV has been a steady decline in its relative competitive position. Consequently, the Commission can no longer take for granted that broadcast television will remain an economically robust medium for free over-the-air video programming. To assure that broadcasting remains competitive, the Commission must modernize its rules to keep pace with technological change and the deregulation of broadcasting's competitors. Accordingly, any review of the Commission's rule on local TV ownership must not only take into account the effect the rule will have on competition and diversity, but also the effect on the maintenance of broadcast TV as a viable medium for video programming and distribution. Particular attention should be given to the question of whether the current rule unnecessarily impedes TV broadcasters' ability to compete in this brave new video programming distribution marketplace.

## IV. IN DECIDING WHETHER AND TO WHAT EXTENT TO RELAX THE DUOPOLY RULE, THE COMMISSION MUST STRIKE A BALANCE BETWEEN PROMOTING COMPETITION AND DIVERSITY, AND PRESERVING A STRONG TV BROADCASTING SYSTEM

### A. THE CURRENT RULE WEAKENS BROADCAST TV AND UNDERMINES THE GOALS OF COMPETITION AND DIVERSITY

At the time the current version of the duopoly rule was adopted, the Commission's principal concerns were promoting competition and diversity in local markets. In promulgating the rule, the Commission concluded that: "[w]hen two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people."[22/] This conclusion was based on two fundamental principles:

> First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.[23/]

In view of the dramatic changes in the video marketplace, the time is ripe for the Commission to question fundamentally the assumption that diversity of ownership in local markets is the only way to ensure diversity of programming and viewpoint. This causal connection has never been established empirically. Indeed, such findings were deemed neither necessary nor practical

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22/ 1964 Report and Order at 1591.

23/ Id. at 1591-2 (emphasis added).

by the Commission: "we do not believe that it is necessary to compile a substantial record of tangible harm to the public resulting from the present rules.... The effects of competition or its absence, and the effects of various types of programs or the absence of programs, are matters not readily susceptible of quantitative ascertainment."[24/]

The Commission's continued reliance on the assumed linkage between diversity of ownership and diversity of programming and viewpoint has no place in today's rapidly expanding video marketplace. The ability of local TV broadcasters to provide diverse programming is determined more by their economic strength in the local video marketplace, than by the number of competitors in the local broadcasting market. Where, as here, the availability of alternative sources of video distribution is causing a steady erosion in broadcast televisions's competitive position, preserving a vibrant and robust medium for free over-the-air video programming will depend on whether station owners are permitted to engage in prudent mergers and acquisitions to benefit from the efficiencies and economies of multiple ownership. Under the current regulatory regime, they are not.

Moreover, contrary to the assumption that diversity of ownership leads to diversity of viewpoint, today's video programming landscape suggests that permitting UHF-UHF and UHF-VHF TV broadcasting combinations in a TV market may result in greater programming diversity. An owner of two TV stations in a

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24/ Id. at 1597.

single market is going to try to maximize the combined audience for the stations by offering different programming on each outlet. Supported by the economies and efficiencies of multiple ownership, this broadcaster will have greater resources -- as well as willingness --- to take risks to provide programs which traditionally may have attracted fewer viewers.

### B. **The Duopoly Rule Can Be Relaxed Substantially With No Risk To Competition Or Diversity**

In the Second Further Notice, the Commission proposed to revise the duopoly rule by 1) removing restrictions on common ownership of television stations with overlapping Grade B contour signals; and 2) permitting such ownership in different DMAs so long as their Grade A signal contours do not overlap.[25] The Commission has correctly determined that the record supports decreasing the prohibited overlap from Grade B to Grade A contours. Stations in different DMAs do not compete with each other for advertising revenues and programming. Moreover, stations with only Grade B overlaps are unlikely to have enough potential viewers in common to be considered strong competitors for audience.

NBC believes, however, the Commission should go much farther by revising its rule to allow the acquisition of up to two television stations with overlapping Grade A signal contours, where one or both of the stations is UHF, unless the Commission

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25/ Second Further Notice, ¶ 13.

expressly finds that the combination would cause demonstrable harm to competition or diversity in the affected local market. Under this formulation, an appropriate balance is expressly struck between allowing TV broadcasters to proceed with efficiency enhancing acquisitions, on the one hand, and promoting local competition and diversity, on the other.

By fostering stronger, more competitive UHF outlets, the benefits to TV broadcasting under this proposal could be substantial. Where transactions involve an economically weak UHF station(s), these benefits would be realized from cost savings, economies of scale, and efficiencies of shared resources and personnel. Even in those cases where a UHF station is on solid financial ground, common ownership with a co-located VHF or UHF might enable the station to provide better and more diverse program service to the community. For example, the second UHF outlet might be used to more fully utilize newsgathering and local programming resources, resulting in an increase in the locally-produced news and public affairs programming available in the community. Other business arrangements between the co-located stations might lead to innovative new programming or public service campaigns. One outstanding example of the pro-competitive, pro-diversity effects of such relaxation is in Naples, Florida, where, as the attached article illustrates,[26] an LMA has served to revitalize a local broadcast market.

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26 Don West, Are Two Stations Better Than One?, Broadcasting & Cable, Feb. 3, 1997, at 5. (See Attachment.)

## V. CONCLUSION

For the foregoing reasons, NBC respectfully requests the Commission to revise its television station local ownership rules as proposed in these Comments.

Respectfully submitted,

Diane Zipursky/RKK

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February 7, 1997

local television stations are increasingly challenged by proliferating multichannel video competitors," the board-approved resolution says. In light of these changes, if local TV stations "are to continue to play the unique role they have in their communities, the FCC's outdated local television ownership rules must be revised...," it says.

"The world has changed a lot," said James Babb, TV board chairman and president of LIN TV. "Why should we have our hands tied behind our back to fight?"

Board member John Hayes, president of Raycom Media, said LMAs allow broadcasters to air more local programing. "With LMAs, [broadcasters] create greater diversity in the marketplace," he explained. "You shouldn't have to buy cable in order to get diverse programing."

But nine board members thought the board should remain neutral, as it did when the board split over ownership issues during debate on the Telecommunications Act. Sources say ABC representative Bill Pitts and joint board chairman Phil Jones were among those leading the fight for neutrality.

"I just don't think the vote reflects the majority of people in the industry," said William Ryan, president of the Post-Newsweek Stations group.

Another board member said the resolution "goes way beyond any credible position" and "no one at the FCC is going to support blanket duopoly and continued LMAs."

Andy Schwartzman, Media Access Project executive director, says the board's vote "should dispel any remaining doubt that the NAB no longer represents all broadcasters. Instead, it's a wholly owned subsidiary of large broadcasters."

On the radio side, board members described their meeting as "non-contentious" as they agreed to go forward with filing comments at the FCC in favor of relaxation of crossownership rules.

Board members also held a free-flowing discussion on broad issues affecting the industry. William O'Shaughnessy, president of WVOX (AM)-WRTN(FM) New Rochelle, N.Y., made a plea to the radio board "not [to] be so focused on money issues," but rather to "concentrate on radio's real strength as the medium closest to the people. Only when we are pressed do we remind ourselves that we are the public's trustees," O'Shaughnessy said. ■

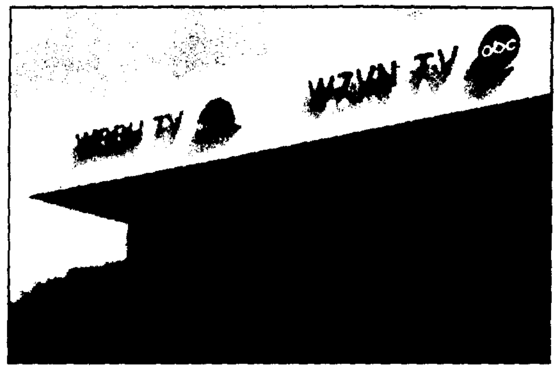
# Are two stations better than one?

**By Don West**

**NAPLES, FLA.**

If you want to know how well LMAs work, ask the man who owns one.

BROADCASTING & CABLE did last week, in the shadow of the NAB's Florida joint board meeting. The owner was Bernard Waterman, president of Waterman Broadcasting in Fort Myers, Fla., licensee of WBBH-TV there and holder of a local marketing agreement for WZVN-TV Naples. That station had been owned by Ellis Communications, but was sold to Montclair Communications, headed by Lara Kunkler, for $21.3 million.



*Waterman Broadcasting's Fort Myers, Fla., facility houses both WBBH-TV (NBC) and WZVN-TV (ABC).*

It couldn't have happened under existing duopoly rules, which the NAB is now devoted to changing. But it and the 50 or so existing LMAs are the precursors of a world in which broadcasters operate multiple channels.

In Fort Myers, it's first class. Waterman has been able to do for both stations what neither could have done alone. Last week the combination was completing an expanded studio operation that would permit both to present head-to-head 11 p.m. newscasts. A new Doppler radar had been installed, the only one in the market. (WBBH-TV is a UHF NBC affiliate, WZVN-TV is a UHF ABC affiliate. The one V in the market is a CBS affiliate.) The stations have spent $4 million for the upgrade, including studio wiring that anticipates digital operation.

Waterman is forceful in advocating the LMA approach. "The government has allowed concentration in all media other than over-the-air television. Cable has multiple channels and advertising interconnections agreements that allow them to sell against an entire region. They're getting into the local news business against us. Trying to compete against the conglomerates is difficult and getting more difficult."

Echoed Steven Pontius, the WBBH-TV general manager: "Even the telephone company is competing against us, not with television but with the Yellow Pages. And DBS encroachment is becoming meaningful, taking our viewers away in favor of stations from New York. Even MMDS, run by American Wireless, is making inroads."

The Waterman approach has been to expand competition, not diminish it, said Pontius. "A lot of people thought that when we took on an LMA, we'd try to drive it into the ground. Our way is to make WZVN-TV the best station it can be."

"Every medium has been permitted to expand except us," said Waterman. "We're still living in 1934. The major assets television could have today are duopolies and LMAs."

Waterman said it would be several years before the combined operation paid for itself and began making money, but he was confident it was the right direction TV should take to compete.

If two stations are so good, wouldn't three be better? Waterman said it might be hard to put your arms around such an operation. But that's not the question, he said. "The question is: What if we don't [expand the number of channels]? What if the industry is not permitted to compete? We can't now. I've been in the business for 45 years and it is my sincere belief that broadcasters can't compete fairly.

"Our only product is local news. The *New York Times* in Sarasota now has a 24-hour news product. If you take us out of the playing field, who is going to handle the public service? Where are the candidates for political office going to go? First news will go. Then sports goes. I tell you, we are in a very delicate area for the future of over-the-air television today." ■